United States Court of Appeals

for the Second Circuit

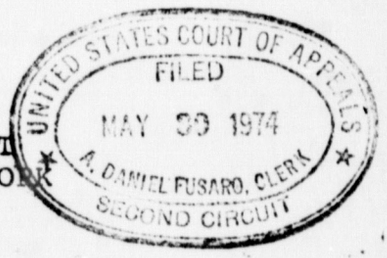
BRIEF FOR APPELLEE

74-1365

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, -against- PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPE, and JULIUS ZARETSKY, Defendants-Appellees.	Docket No. 74-1365

BRIEF FOR APPELLEE
MATTHEW PRINCIPE



ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
DISMISSING AN INDICTMENT

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BRIEF FOR APPELLEE MATTHEW PRINCIPE

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
DISMISSING AN INDICTMENT

QUESTION PRESENTED

Whether the order dismissing the indictment due to the Government's failure to supply the memorandum of prosecution was valid and appropriate.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is brought by the Government from an order of the United States District Court for the Eastern District of New York (The Honorable Orrin G. Judd) entered on February 8, 1974, dismissing an indictment.

This Court continued the assignment of The Legal Aid Society, Federal Defender Services Unit, as counsel for Matthew Principe on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On January 8, 1973, Pablo Berrios was indicted for violation of 29 U.S.C. §504. The charge alleged that from June 17, 1971, to June 29, 1972, Berrios served as a trustee of the executive board of Teamsters Union Local 840 within five years of having been convicted of a specific category of felony. A superseding indictment was filed on March 26, 1973. In that document a second count was added charging appellee Principe and others with knowingly permitting Berrios to hold office.

Counsel for Berrios then requested dismissal of the indictment because the prosecution was a selective one.

Counsel asserted that the prosecution was not initiated because of a violation of the statute but because of other factors which constituted an improper basis for prosecution.*

In both the affidavit in support of the motion and in the argument on the motion which was held on October 12, 1973, defense counsel set forth without contradiction by the Government, that the Teamsters Union Local 840 had been involved in a bitter labor dispute with the Marriott Hotel chain in an attempt to unionize the In-Flight Foods Division. The Marriott chain and its top management were closely allied with President Nixon and the 1972 re-election campaign. Marriott, the president of the company, was a chairman of 1968 and 1972 election organizations for the President. The vice-president of Mariott was Donald Nixon, and Herbert Kalmbach was counsel to the Marriott corporation.

As a second prong to the argument, defense counsel stated, again without contradiction, that while in the 1972 presidential campaign the Teamsters Union was predominantly pro-Nixon, was represented by Charles Colson, and had contributed $400,000 to the Nixon campaign fund, Berrios was a vocal supporter of George McGovern. The most powerful pro-McGovern teamster, Frank Gibbons, was investigated by the Internal

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*All the other defendants joined in this motion.

Revenue Service.

Counsel concluded his offer of proof by showing in a letter from Philip Wilens, Chief of the Management and Labor Section of the Justice Department, that from July 1969 to the present there had been only three prosecutions under section 504, two of which had been dismissed. In a second letter from the Assistant Director for Regulations and Administrative Rulings of the Labor Department it was shown that a total of nine prosecutions had been brought under the statute, only one of which was for aiding in the violation of Section 504.

Defense counsel argued that the circumstances outlined required a hearing on the issue of selective prosecution. In response to the defense position, the Government argued that the prosecution had been commenced in the normal authorization process.

Judge Judd found that there was a factual basis for requiring the Government to reveal its letter requesting authorization to prosecute (A.54*). The Government refused to produce the letter, arguing that the defendants had not made a sufficient factual showing.

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*Numerals in parentheses preceded by "A" refer to pages of the Appendix to the Government's brief.

Judge Judd also suggested that testimony from officials of the Department of Labor or the Department of Justice on other unreported or unprosecuted violations would be material (A.55).

The Assistant United States Attorney insisted that there was no

> ...justification or substantial necessity in the law for departmental attorneys or any members of the executive branch to come into court to justify a decision on the part of the executive to bring a prosecution.
>
> (A.57).

To determine whether the defense was entitled to anything more, Judge Judd directed that the memorandum recommending prosecution be provided to the Court and to the defense (A.59).

The Government objected even to this method of proceeding, arguing that the memorandum was an internal government document, that it contained confidential grand jury and other material, and that the defense showing was inadequate (A.59).

The Court then ordered that the memorandum of prosecution, excised of grand jury testimony relating to those who were not defendants and other parts necessary to pro-

tect confidentiality, be produced (A.61). The Government countered with a request for in camera inspection of the memorandum (A.62). The court ruled that the defense was entitled to see the memorandum. In a letter dated November 16, 1973, the Government reaffirmed its position not to supply the memorandum, stating that the defense had not made a sufficient factual showing.

On November 26, 1973, Judge Judd signed an order directing that the memorandum be supplied to the defense. On January 7, 1974, the Judge issued an opinion. He held that the defense had made a sufficient offer of proof to require a hearing and that it was within his discretion to order the production of material necessary to examine the witnesses.

The Government adhered to its refusal to supply the memorandum and, on February 8, 1974, the indictment was dismissed.

ARGUMENT

THE ORDER DISMISSING THE INDICTMENT DUE TO THE GOVERNMENT'S FAILURE TO SUPPLY THE MEMORANDUM OF PROSECUTION WAS VALID AND ENTIRELY APPROPRIATE.

Judge Judd found that the defense had made a sufficient showing to require further proceedings to resolve the issue of whether the prosecution in this case was the result of purposeful or intentional discrimination against the defendants because of their political and union activities. The Judge wrote in his opinion that this decision was premised on counsel's statement

> ... that he would show the following at a "selective prosecution hearing" if such a hearing were ordered by the court: (1) That since 1969 there have been only a few prosecutions under 29 U.S.C. §504 and since 1969 there have been only three; (2) that Berrios was indicted after having been involved in a labor dispute with the Marriott Corporation; (3) that Mr. Marriott was the chairman of President Nixon's 1968 and 1972 campaign organizations; (4) that Donald Nixon, the President's brother, is a vice-president of Marriott; (5) that Marriott's attorney, Herbert Kalmbach, is also President Nixon's attorney, (6) that there was an internal battle in the Teamsters Union between those who supported President Nixon's campaign for re-election and those who supported the candidacy of Senator McGovern;

> and (7) that defendant Berrios was one of the few Teamster officials who publicly supported Senator McGovern.
>
> (A.107-08).

The Government's position was that the statement made by the defense did not make a sufficient showing, and that the circumstances were merely co-incidental.

The circumstances in this case arise in a context which prohibits resolution of the claim of discriminatory prosecution on the cry of coincidence. The expressed opinion of the Chief Executive of the United States, articulated in September 1972, just three months prior to the indictment in this case, was that the Justice Department would be used against those opposing the President's re-election. As reflected in the White House Transcripts, after a discussion of methods of checking on the McGovern fundraising effort, John Dean, then Counsel to the President, stated:

> [Dean]: Along that line, one of the things I've tried to do, I have begun to keep notes on a lot of people who are emerging as less than our friends because this will be over some day and we shouldn't forget the way some of them have treated us.
>
> [The President]: I want the most comprehensive notes on all those who tried to do us in. They didn't have to do it. If we had had a very close election and they were playing the other side I would understand this. No -- they were doing this quite deliberately and they are asking for

> it and they are going to get it. We have not used the power in this first four years as you know. We have never used it. We have not used the Bureau and we have not used the Justice Department but things are going to change now. And they are either going to do it right or go.
>
> THE WHITE HOUSE TRANSCRIPTS at 63 (Bantam 1974).

These statements, in the context of the appellees' anti-Nixon stance, attempts to unionize an industry run by powerful pro-Nixon supporters, and the virtual absence of prosecutions under §504 raise the issue as to whether the appellees were being prosecuted because they engaged in their First Amendment rights to participate in political and union activities (United States v. Falk, 479 F.2d 616 (7th Cir. en banc 1973); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972); Moss v. Hornig, 314 F.2d 89, 93 (2d Cir. 1963)), and require a hearing (United States v. Falk, supra).

In Falk, the court ordered a hearing to determine the issue after finding a sufficient preliminary showing by the defense. The defendant was a vocal dissenter from Vietnam policy charged with failing to carry his draft registration card. As proof of the improper motive to prosecute, defense counsel cited the Government's policy not to prosecute violators of card possession regulations, Falk's vocal dissent, the chain of command whose authority was needed to bring the

prosecution, and the timing of the indictment. 479 F.2d at 623. In United States v. Steele, supra, and United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), the issue of discriminatory prosecution was fully litigated before the district court. In both cases the courts of appeal dismissed the prosecutions because the defendants had proven discrimination. See also United States v. Robinson, 311 F.Supp. 1063 (W.D.Mo. 1969). In Steele, the defendant was found to have been prosecuted for his vocal opposition to the census-taking procedures when nine others who had merely failed to supply the information were not prosecuted. In Crowthers, participants in anti-war prayer meetings at the Pentagon were prosecuted for disorderly conduct although participants in other activities, some by the military itself, were not prosecuted. These cases, as well as Falk, indicate the factors to be considered in making the showing necessary for a hearing.

While making no claim to having met their ultimate burden, the appellees here have demonstrated that under Falk, Steele, and Crowthers they are entitled to a hearing or further proceeding. Here, there was the expressed policy of the Chief Executive to use law enforcement procedures to punish political opponents (United States v. Falk, supra; United States v. Steele, supra, 461 F.2d at 1152); the filing of the indictments against the appellees within several months of that statement (United States v. Falk, supra, 479 F.2d at 622); the vocal activities of the appellees against powerful

pro-Nixon, anti-labor people (United States v. Falk, supra; United States v. Steele, supra, 461 F.2d at 1152); the political views of the appellees in contrast to those of their fellow union members who were actively engaged in pro-Nixon activities; and the minimal number of prosecutions in the life of the statute.

The Government's position is that this showing is insufficient to warrant a hearing or any further proceedings. In support of its position the Government seeks to rely on two cases which, to the contrary, support Judge Judd's decision. In United States v. Malinowski, 347 F.Supp. 347, 353 (E.D.Pa. 1972), affirmed, 472 F.2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973), the district court had granted a hearing on the issue of discriminatory prosecution, which, of course, is what the appellees here had sought below. In Malinowski, the defendant claimed that he was prosecuted for tax violations because of his anti-war activities. Even after the full hearing the district court and the court of appeals found that the defense had not proved discrimination. What the appellees here sought below was the opportunity to prove discrimination.

In the second case cited by the Government, United States v. Ahmed, 347 F.Supp. 912 (M.D.Pa. 1972), affirmed sub nom. United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the district court found, after a post-trial hearing on the issue of discriminatory prosecution, that the claim was premised on bald assertions which did not even support a claim

of discriminatory prosecution. The defendants claimed that the prosecution was initiated to vindicate J. Edgar Hoover, who had made a speech denouncing them. The district court stated that it was incumbent upon the defense to present evidence from which at least an inference of the use of improper standards could be drawn, but that the record failed to produce that. The court of appeals agreed that the defendants were not entitled even to raise the claim of selective prosecution. 482 F.2d at 181.

Thus, the Government's reliance on Ahmed and Malinowski is misplaced: in Malinowski, the ultimate burden was not met; in Ahmed, the primary showing was absent.

The defense having raised a reasonable doubt as to the prosecutor's motive, the Government was then obliged to accept the burden of showing non-discriminatory enforcement. United States v. Falk, supra, 479 F.2d at 620-21. In United States v. Crowther, supra, where the conviction was reversed after the defense had established discrimination, the court went on to outline the Government's burden where a strong suggestion of discrimination exists:

> ... We think when the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint, and where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence

> as to what extent loud and unusual noise and obstruction of the concourse may have occurred on other approved occasions. It is neither novel nor unfair to require the party in possession of the facts to disclose them. Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1961). We think defendants made a sufficient prima facie showing that application of the noise and obstruction regulation to them was pretensive and that the government, being in possession of the facts as to noise and obstruction of approved activity, should have come forward with evidence, if it could, to rebut the inference of a double standard.
>
> 456 F.2d at 1078.

See also Campbell v. United States, 365 U.S. 85, 96 (1961); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972); Allstate Finance Corp. v. Zimmerman, 330 F.2d 740 (5th Cir. 1964); United States ex rel. Williams v. LaVallee, 487 F.2d 1006, 1014 (2d Cir. 1973).*

In the face of the defense offers and the shifted burden, Judge Judd expressed belief that a hearing was necessary at which officials from the Justice and Labor Departments might be called to testify. Hearings at which testimony from officials was elicited were, of course, held in Malinowski, where testimony was given by an Internal Revenue Service agent, an Assistant United States Attorney, and the Chief of the In-

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*Even the cases referred to by the Government acknowledge this burden. United States v. Ahmed, supra, 347 F.Supp. at 928; United States v. Malinowski, supra, 347 F.Supp. at 354.

telligence Division for the Eastern Pennsylvania District of the Internal Revenue Service; in Steele, where testimony was given by the regional head of the census in Hawaii; and in Falk, where testimony was to be received from the Assistant United States Attorney. In the face of Judge Judd's suggestion that a hearing be held, the Assistant United States Attorney vociferously objected to such a proceeding, arguing that executive officials should not be required to justify their decisions to the judiciary. Apparently in the face of these objections,* the Judge agreed to use the memorandum of prosecution to see if any further proceedings were necessary. However, the Government objected to permitting the defense to see the memorandum because it was an internal government document.**

The law has long been clear that when government documents are critical or relevant to the defense of a criminal case, the Government cannot withhold those documents. If the Government insists on exercising a claim of privilege premised on confidentiality of internal memoranda, the prosecution must be dismissed. United States v. Reynolds, 345

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*The Judge initially indicated he believed two things would be helpful to resolve the issue: the memorandum and testimony from Labor and Justice Department officials on prosecution policy and declinations to prosecute.

**The Government also said the memorandum might contain irrelevant and confidential material. The Judge permitted the Government to use its own judgment in excising such material.

U.S. 1, 12 (1953);* United States v. Rhodes, 360 F.2d 865 (7th Cir. 1966); United States v. Grayson, 166 F.2d 863, 870 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946); United States v. Andolschek, 145 F.2d 503 (2d Cir. 1944). See Proposed Federal Rules of Evidence, Rule 509 (e).

The Government's claim was that its offer of in camera inspection of the memorandum is enough. However, not only was the defense entitled to see the document because it had met its burden of proof, but the Government failed to prove that revelation of the limited portion of the memorandum relevant to the reason for prosecution was contrary to the public interest. See Proposed Federal Rules of Evidence, Rule 509(a)(2).** If the decision to prosecute was premised on

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* Respondents [in this civil case] have cited to us those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free [footnote omitted]. The rational of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense....

**The Government's claim that Rule 16 of the Federal Rules of Criminal Procedure applies here is incorrect. This proceeding is not one for discovery, but presentation of a defense which might terminate the proceeding. Thus, it is Rule 12(b)(4) which applies:

reasons violative of the Constitution, the public interest is best served by revealing those ill-motives; if the motivation was justifiable in terms of policy, the public interest is not harmed in any way. Candor and confidentiality between government officials are not harmed by disclosure of legitimate governmental activity in the face of substantial claims to the contrary.

Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(b)(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or affidavits or in such other manner as the court may direct.

CONCLUSION

For the above-stated reasons, the order dismissing the indictment should be affirmed.

Respectfully submitted,

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I certify a copy has been mailed today to the the USA EDNY

Ryan Second

5/30/74